

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IGOR BRODETSKI,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 98-732 (RWR)
)	
JOSEPH DUFFEY, Director,)	
USIA and VOICE OF AMERICA,)	
et al.,)	
)	
Defendants.)	

MEMORANDUM OPINION

Plaintiff Igor Brodetski,¹ a white male of Russian origin and an employee of the Russian Branch of the Voice of America ("VOA"), a division of the United States Information Agency ("USIA"), brought this claim of national origin and racial discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2, 2000e-3 (1994), as amended ("Title VII"), alleging that three different entities - - the Equal Employment Opportunity Commission ("EEOC"), the Office of Civil Rights ("OCR") within USIA, and the Freedom of Information Act ("FOIA") Office within USIA - - improperly handled administrative complaints he had filed. Defendants have moved

¹ Plaintiff spells his name "Brodeski" in his complaint, but the majority of his subsequent submissions, as well as his affidavit and the brief filed on his behalf for the Equal Employment Opportunity Commission hearing, spell his name "Brodetski." The Court assumes that the spelling on the affidavit is correct.

to dismiss or, in the alternative, for summary judgment, and plaintiff has moved to amend his complaint. Plaintiff's motion will be granted, but since his complaint, even as amended, fails to state a claim upon which relief can be granted, defendants' motion to dismiss will be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

BACKGROUND

Brodetzki has been employed as an International Radio Broadcaster with VOA since 1984. (Defs.' Mem. in Supp. of Defs.' Mot. Dismiss and/or Summ. J. ("Defs.' Mem.") at 2.) He began to complain of retaliation after he participated in a colleague's 1989 EEO proceeding against defendants. (Compl. at 4.) At the time plaintiff filed this action, he had submitted fifty-eight separate complaints with USIA'S OCR and had appealed many of the complaints to the EEOC after the OCR dismissed them. (Compl. at 5.) Each of these fifty-eight complaints alleged that defendants retaliated against plaintiff for his protected EEO activities.²

²These complaints are also the subject of three other civil actions filed against defendants in this Court. The first, Civil Action No. 93-1610, was decided by Judge Urbina on May 23, 1995 in defendants' favor. The other two, Civil Action Nos. 98-126 and 98-839, are the subjects of other orders issued today.

In addition to his fifty-eight OCR complaints, plaintiff filed two complaints with the OCR in early 1997 that alleged the OCR had discriminated against him because of his race and national origin. (Compl. at 6.) He claimed that the OCR inadequately processed his complaints by exhibiting a "definite pattern" of "deliberate procrastination and sabotage" in their investigation, slow processing and consistent dismissal of his numerous retaliation complaints. (Compl. at 2, 6.) Plaintiff stated:

[T]he officials of the Office of Civil Rights, United States Information Agency, being exclusively the representatives of the Negro race, refuse to recognize the claims of discrimination and retaliation when they come from a member of the White race, apparently considering themselves to be the sole victims of all the evils of society.

(Compl. at 6.) Plaintiff also alleged that his national origin was a basis for defendants' actions, stating, "I consider the fact that I am Russian to be an additional factor in the situation . . . Russophobia is an established fact in the USA." (Compl. at 6.)³

³In one of the letters attached to his complaint, plaintiff made a vague reference to gender, stating, "I filed [the two letters of complaint] . . . claiming discrimination on the basis of race, nationality, and probably gender" (Compl. at Ex. 3, Letter to Susan B. Reilly dated 5/2/97.) I do not find that plaintiff has asserted an additional cause of action based on gender discrimination. Plaintiff made only a passing reference to gender in the third attachment to his complaint, an exhibit "intended to show

Plaintiff filed these two complaints with and against the OCR, and defendants transmitted them to the Department of State's Office of Equal Employment Opportunity and Civil Rights ("S/EEOCR") for processing. (Compl. at Ex. 1b.) According to the S/EEOCR, this procedure is part of a standard reciprocal agreement that they have with the USIA to exchange "EEO cases that are considered or can be perceived as a conflict of interest . . . i.e. cases that are filed against either office." (Id.) On January 23, 1998, S/EEOCR sent plaintiff the agency's final decision dismissing his discrimination complaints against the OCR. The decision stated that plaintiff's "mere allegations" do not "constitute an actionable claim." (Id.) Instead of appealing to the EEOC, plaintiff filed a civil action in this Court, in accordance with the S/EEOCR's final decision letter and pursuant to 29 C.F.R. § 1614.110 (West 2000). (Id.)

Plaintiff's complaint includes the two allegations of discrimination against the OCR that were dismissed by the S/EEOCR, as well as several other allegations of discrimination

numerosity of the complaints and their general direction," and not to assert a new cause of action. (Compl. at Ex. 3.) Even if plaintiff intended to introduce a new claim of gender discrimination in this exhibit, the claim would not withstand defendants' motion to dismiss, because, for the reasons set forth below, plaintiff failed to state a Title VII claim "upon which relief can be granted." Fed. R. Civ. P. 12(b)(6).

made against both the EEOC and USIA's FOIA office.

Specifically, plaintiff alleged that the OCR violated Title VII when it: (1) delayed processing his EEO complaints; (2) refused to investigate or respond to several of his complaints; (3) falsified dates in their records to further delay his complaints and avoid certain time limits; (4) misinterpreted and mischaracterized the facts outlined in his EEO complaints; (5) disregarded his civil rights and protected the VOA management by dismissing his complaints; (6) mishandled the investigation of his complaints; (7) arbitrarily consolidated complaints that were not related to each other to further confuse and complicate the EEO process; and (8) generally mishandled his complaints overall. (Compl. at Exs. 1-5.) Plaintiff also alleged that the FOIA office within USIA denied him access to evidentiary information needed to fortify his complaints against USIA and the VOA management. (Defs.' Mem. at Ex. B.)

In addition, plaintiff alleged that the EEOC: (1) delayed processing his EEO complaints; (2) misinterpreted the facts outlined in his EEO complaints; (3) remanded certain complaints to the OCR for further review as an additional method of delaying the process; (4) required that administrative remedies be exhausted before processing complaints when it was the OCR

that was actually delaying the process; and (5) generally mishandled his EEO complaints overall. (Compl. at Exs. 1-5.)

MOTION TO CONSOLIDATE OR TO AMEND

Plaintiff filed a motion to consolidate or to amend, seeking to join to the complaint an additional incident of alleged discrimination that occurred since he filed this action. (Pl.'s Mot. to Consolidate (or to Amend) of 12/6/00 at 1.) Plaintiff asserts that the additional incident, like the incidents alleged in his original complaint, shows that defendants improperly handled his administrative complaints. Defendants oppose consolidation, claiming that the new incident is not the subject of an action pending before the court as required under Fed. R. Civ. P. 42(a), and that the new incident and the incidents in the original complaint do not involve a common question of law and fact. (Def.'s Opp'n to Pl.'s Mot. to Consolidate at 2-3.) Construing plaintiff's motion as one to amend, and finding amendment proper, I will grant this motion.

While the right to amend or supplement the original pleading is not automatic, see Foman v. Davis, 371 U.S. 178, 182 (1962), "leave [of the court] shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Factors to consider in evaluating a motion to amend include "undue delay,

bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." Foman, 371 U.S. at 182. At the same time, "refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion." Id.

Defendants do not address the substance of the newly alleged incident in their opposition to plaintiff's motion and offer no argument that the amendment would unduly prejudice them. There is no indication that plaintiff has unduly delayed in filing his December 6, 2000 motion to amend or that plaintiff acted in bad faith. Therefore, plaintiff's Motion to Consolidate (or to Amend) will be granted.

MOTION TO DISMISS

Defendants have moved to dismiss plaintiff's original complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), on the grounds that plaintiff "failed to state a claim upon which he can be granted relief." (Defs.' Mem. at 1.) Because the incidents added in the amended complaint state claims identical to those in the original complaint, the sufficiency of the amended complaint also will be assessed.

In making a Rule 12(b)(6) motion, the moving party bears the burden of showing that no claim exists. See Charles Alan Wright & Arthur Miller, Federal Practice and Procedure § 1357 (Supp. 2000). All of the amended complaint's factual allegations must be considered true for purposes of deciding the motion. See Doe v. United States Dep't of Justice, 753 F.2d 1092, 1102 (D.C. Cir. 1985). In addition, plaintiff "must be granted the benefit of all inferences that can be derived from the facts alleged." Schuler v. United States, 617 F.2d 605, 608 (D.C. Cir. 1979). Accordingly, I may grant defendants' motion to dismiss only if "it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Since plaintiff appears *pro se*, I must read his amended complaint liberally. See Richardson v. United States, 193 F.3d 545, 548 (D.C. Cir. 1999) (citing Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (per curiam)). A *pro se* plaintiff's pleadings should be held "to less stringent standards than formal pleadings drafted by lawyers." Haines, 404 U.S. at 520.

A. Plaintiff's Allegations Against the EEOC

Title VII does not provide a right of action against the EEOC for mishandling EEO complaints or using improper administrative procedures in processing them. See, e.g., McCottrell v. EEOC, 726 F.2d 350, 351 (7th Cir. 1983); Young v. Sullivan, 733 F. Supp. 131, 132 (D.D.C. 1990). Title VII provides civil remedies only for substantive claims of employment discrimination, and not for procedural claims arising from dissatisfaction with EEO administrative proceedings. Young, 733 F. Supp. at 132 (holding that Title VII "does not create an independent cause of action against the EEOC for its investigation and processing of a charge"). The Ninth Circuit has held that "[i]mplying a cause of action against the EEOC contradicts this policy of individual enforcement of equal employment opportunity laws and could dissipate the limited resources of the Commission in fruitless litigation with charging parties." Ward v. EEOC, 719 F.2d 311, 313 (9th Cir. 1983), cert. denied, 466 U.S. 953 (1984).

All of the allegations that plaintiff has made against the EEOC concern mishandling or using improper administrative procedures in processing his EEO complaints. Because Title VII does not provide a cause of action for EEOC administrative errors, these portions of plaintiff's amended complaint will be dismissed under Federal Rule of Civil Procedure 12(b)(6).

B. Plaintiff's Allegations Against the OCR and
the FOIA Office

Likewise, Title VII does not establish a cause of action against EEO offices located within federal agencies.

Specifically,

Congress has not explicitly created a right of action against the EEOC or any other agency based upon the handling of a [sic] administrative complaint of discrimination. Further it is well settled that charging parties do not have an implied remedy against the EEOC or any other agency arising from the handling of a charge or a decision.

Storey v. Rubin, 976 F. Supp. 1478, 1484 (N.D. Ga. 1997)

(emphasis added). See also Svenson v. Thomas, 607 F. Supp.

1004, 1005 n.1 (D.D.C. 1985) (holding that plaintiff may not

bring a Title VII lawsuit against the EEO office within the

Department of Labor for alleged deficiencies in its processing

of plaintiff's EEO complaints); Olivares, 934 F. Supp. at 704

(holding that plaintiff could not maintain a Title VII claim

against the NASA EEO office for alleged delays in complaint

processing); Lowell v. Brown, No. 96-562, 2000 WL 521726, at *7

(N.D. Ill. March 2, 2000) (holding that plaintiff could not

maintain a Title VII claim that alleged the Department of

Veterans Affairs acted in a retaliatory manner when

investigating and processing plaintiff's EEO complaint); Schaff

v. Shalala, Nos. 93-1251, 93-1993, 1994 WL 395751, at *3

(D. Md. July 14, 1994) (holding that plaintiff could not

maintain a Title VII claim against the Department of Health and Human Services that alleged deficiencies in the agency's processing of EEO complaints).

The OCR is the primary office responsible for processing EEO complaints filed against the USIA by its employees, serving as a conduit between the EEOC and the USIA. The FOIA Office also plays a role in processing EEO complaints by providing requested documentary information where appropriate. See 5 U.S.C. § 552 (West 2000). Therefore, plaintiff cannot bring his Title VII claims against either the OCR or the FOIA Office. As with administrative-based actions against the EEOC, Title VII does not provide a cause of action against EEO complaint processing offices located within federal agencies. Accordingly, plaintiff's claims against the OCR and the FOIA Office, which constitute the remaining portions of his amended complaint, will be dismissed for failure to state a claim pursuant to Rule 12(b)(6).

C. Plaintiff's Remedy

While Title VII does not establish a cause of action based on the processing of EEO complaints, Title VII does allow plaintiffs to seek *de novo* review of their underlying discrimination claims. See Chandler v. Roudebush, 425 U.S. 840, 845-46 (1976); Packer v. Garrett, 735 F. Supp. 8, 9-10

(D.D.C. 1990) ("The only 'right' [Title VII] establishes is the right to be free of [employment] discrimination. This interest is wholly preserved, even if the EEOC errs in its processing of the charge, by the trial *de novo*."); Trout v. Lehman, No.

CIV.A.82-2507, 1983 WL 578, at *1 (D.D.C. July 7, 1983)

("Plaintiff's sole remedy for what she felt to be an unsatisfactory investigation of her administrative complaint was to bring this *de novo* action in this Court on the merits of that complaint.").

Plaintiff has pursued *de novo* review of his Title VII retaliation claims in three separate actions filed with this Court, Civil Action Nos. 93-1610, 98-126 and 98-839. These substantive retaliation claims are plaintiff's sole judicial recourse under Title VII after the OCR and the EEOC dismissed his complaints.

CONCLUSION

Plaintiff's motion to amend his complaint will be granted. However, plaintiff has failed to state a claim against the EEOC, the OCR or the FOIA Office upon which relief can be granted. Accordingly, defendants' Motion to Dismiss all claims in plaintiff's original complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) will be granted, and all remaining

claims in plaintiff's amended complaint likewise will be dismissed. An appropriate Order accompanies this Opinion.

SIGNED this _____ day of _____, 2001.

RICHARD W. ROBERTS
United States District Judge

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ORDER

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that plaintiff's Motion to Consolidate (or to Amend) [24] be, and hereby is, GRANTED. It is further

ORDERED that defendants' Motion to Dismiss [11] be, and hereby is, GRANTED, and that plaintiff's original and amended complaints be, and hereby are, DISMISSED. It is further

ORDERED that all other pending motions be, and hereby are, DENIED as moot. This is a final appealable Order.

SIGNED this _____ day of _____, 2001.

RICHARD W. ROBERTS
United States District Judge